United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original w/affidavit of
regularity

74-2556

To be argued by
LEE A. ADLERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2556

UNITED STATES OF AMERICA,
Appellee,

—against—

JOHN DOE, a/k/a JUANITO CANELA CASTILLO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Eastern District of New York.

PAUL B. BERGMAN,
LEE A. ADLERSTEIN,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

John Doe, also known as Juanito Canela-Castillo appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*), entered November 26, 1974, following a jury trial, convicting him of fraud and misuse of a visa and other entry documents in violation of Title 18, U.S.C. Section 1546. Appellant was sentenced to a term of imprisonment for two years and is currently incarcerated pursuant to that sentence.

On this appeal, appellant contends that the prosecutor's summation, in which it was stated that appellant had lied to United States Immigration officials and to the jury from the witness stand, deprived appellant of a fair trial and requires reversal of the conviction.

Statement of the Case

A. Introduction and Summary

On October 15, 1974 the appellant arrived at John F. Kennedy Airport on a direct flight from Santo Domingo, Dominican Republic to New York. Appellant presented at the Airport, to United States Immigration personnel, a Dominican Republic passport bearing the name Juanito Canela-Castillo, number 00698-L.V. On page 11 of the passport there was stamped a United States visa, number 030838, issued on April 18, 1974 and valid until April 18, 1978 for multiple visits to the United States. Because the passport appeared to be irregular, appellant was questioned by Immigration Authorities and produced a Dominican Republic identification card, number 18265, and a round trip Santo Domingo-New York-Santo Domingo airplane ticket, both documents bearing the name Juanito Canela-Castillo.

Appellant was arrested by United States Immigration authorities on the day he arrived at the airport. He was arraigned before the United States Magistrate on October 22, 1974 and indicted by the Federal Grand Jury on October 29, 1974. A one count indictment was filed charging appellant with impersonation of another individual in order to gain admission into the United States. T. 18 U.S.C. § 1546.

At the trial the Government presented expert evidence to show that appellant could not have been the proper holder of the passport and visa. Appellant testified that the entry documents did belong to him.

B. The Government's Case

John Green, an immigration inspector with the Immigration and Naturalization Service, testified that he was on duty on October 15, 1974 at the primary receiving area for United States Immigration at the Pan American Airlines arrival terminal when passengers on a Santo Domingo to New York flight were processed for entry into the United States. Green stated that appellant walked to Green's desk and presented a Dominican Republic passport bearing the name Juanito Canelo-Castillo, number 00698-L.V., and bearing a visa for entry into the United States, number 030838. Because appellant did not appear to Green to be 37 years old, as the passport indicated, Green became suspicious (16)* and sent appellant to a "secondary" inspection area for a closer review of arrival documents (20).

Kathleen Thompson was the Immigration Inspector who examined documents submitted by appellant at the secondary inspection area. She testified that one of her duties was to look for irregularities in travel documents, including photo substitutions in passports (23). In addition Miss Thompson had experience in examining Dominican Republic passports (24). Miss Thompson testified that she noticed irregularities in the passport appellant presented: an incongruence of seals on the photograph page indicated a "possibility of a photo substitution" (30); the number "3" in the birthdate 1937 appeared to have been possibly altered from another number (28). Appellant appeared to Miss Thompson, as he had to Mr. Green, to be younger than the 37 years the passport indicated he was (28). Two signature samples taken of appellant by Miss Thompson at the secondary inspection position and a round trip, Santo Domingo-New York airplane ticket, were admitted into evidence during Miss Thompson's testimony. The ticket indicated no

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* Numbers in parenthesis refer to the page of the record unless preceded by "G.A." in which case reference is to the Government's Appendix.

scheduled return flight and was valid for one year. In addition, Miss Thompson identified the Dominican Republic identity card that had been shown by appellant to Miss Thompson, representing the card to be his. The card was admitted into evidence. The birthdate given on the card was November 18, 1937 (36), not June 18, 1937 as appeared on the passport. In addition, the identification card did not include a signature or a thumb print even though there is specific insert space on the card for such identifying information.

The Government presented technical evidence showing that appellant was not the true owner of the passport: Donald G. Mooney a fingerprint expert employed by the United States Postal Inspection Service testified that appellant's thumb print taken by Federal authorities shortly after appellant's arrest were not prints of the same person whose thumb print appeared on the passport (40); Thomas J. Donovan, a documents expert employed by the United States Postal Inspection Service testified that the signature samples written by appellant at the request of Miss Thompson were not written by the same person who wrote the signature that is fonud on page 5 of the passport (45-46). Mr. Donovan also testified that the date 1937 found on page 2 of the passport had been altered from the date 1957 (90).

Through the testimony of Evelyn A. Wythe, a United States Vice-consul in Santo Domingo, the visa application form presented to the United States consulate in Santo Domingo by the person who was actually issued the visa, was introduced into evidence. Miss Wythe testified that attached to the visa application form is a photograph of the true applicant, which the Government submits does not resemble appellant. In addition Miss Wythe recognized a notation in her handwriting on the bottom of the form showing that the date of birth given by the actual applicant was *1957* (75). Prior to Miss Wythe's testimony, Mr. Donovan, the documents expert, had testified that whereas the signature

on the passport and the visa application form were written by the same person, the signature samples given by appellant were written by a person other than the person who signed the visa application forms or the passport (52).

C. The Defense Case

Appellant testified that his true name was Juanito Canela-Castillo and that he was the legitimate holder of the passport and visa. Because the passport had notations showing that the bearer had been to the United States in May, 1974, and appellant testified to that effect (100), appellant was cross-examined about his prior visit. Not only did appellant fail to recall where he had stayed during the "five day" May visit or show a purpose for it other than for pleasure (112), appellant also stated that he had not befriended anyone nor hardly ventured from his hotel room during the visit, (110, 113) not even to be able to tell what the weather had been like (119-120). Appellant further testified that his May visit cost about $400.00, which was not a substantial amount of money for him (115), though the rent of the house he lived in ("not a very good house") was twenty dollars per month (116). In connection with the October visit, appellant said he knew when he intended to leave the United States (123), but had not bothered to make a reservation to return to the Dominican Republic prior to landing in this country. When confronted with the signature and thumb print on the passport appellant stated they belonged to him (129).

D. The Sentencing

At the sentencing hearing held November 26, 1974 Judge Weinstein stated:

> I observed the defendant during the course of the trial and in my mind beyond a reasonable doubt he perjured himself. However, I am not going to add

to his sentence on that ground. I am going to sentence him to a substantial jail term because this was a deliberate and clear attempt to defraud the United States by using false passports and other documents. No contrition has been shown by the defendant. The defendant does not have a family. I believe that he is an intelligent person and that he deliberately entered into this fraud. (G.A. 27-28).

ARGUMENT

POINT I

In the context of the entire case the prosecutor's remarks on summation were not inappropriate.

The portion of the prosecutor's summation on which appellant bases his argument, appears in the final sentences of the summation (G.A. 22) where the prosecutor stated that defendant had "lied" to United States immigration officers shortly after appellant's arrival in this country and had "lied" to the jury when he testified at the trial. The Government submits that whereas the use of the word "lied" might constitute reversible error in some trial situations, see *United States* v. *White*, 486 F.2d 204 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974) such language did not taint the instant conviction.* The law is well established in this circuit that:

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* This Court has been reluctant to hold that use of a specific word standing alone automatically triggers reversible error. See *United States* v. *Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972) (use of phrase "honest Phil" in derogation of defendant); *United States* v. *Guidarelli* 318 F.2d 523 (2d Cir.), *cert. denied*, 375 U.S. 828 (1963), (use of word "leech"); *United States* v. *Cohen*, 177 F.2d 523 (2d Cir. 1949), *cert. denied*, 339 U.S. 914 (1950), (use of word "Pimp").

> Each case must be scrutinized on the particular facts to determine whether a trial error is harmless error or prejudicial error when viewed in the light of the trial record as a whole, not whether each isolated incident viewed by itself constitutes reversible error.

United States v. *Grunberger*, 431 F.2d 1062, 1069 (2d Cir. 1970). See also *United States* v. *Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972) and *United States* v. *White*, *supra* at 206-07.

Factors that may be taken into consideration by a court in determining whether a prosecutor's remarks are prejudicial include whether the comments are addressed to "the purpose and credibility of any witness," *United States* v. *De Angelis*, 490 F.2d 1004, 1008 (2d Cir.), *cert. denied*, 416 U.S. 916 (1974); *United States* v. *Salazar*, 485 F.2d 1272, 1280 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States* v. *Greenberg*, 268 F.2d 120, 124 (2d Cir. 1959), and whether the evidence developed at trial is strong enough to render harmless any remarks which may have been inappropriate, *United States* v. *Benter*, *supra* at 1178; *United States* v. *Greenberg*, *supra* at 124; *United States* v. *Cohen*, 177 F.2d 523 (2d Cir. 1949), *cert. denied*, 339 U.S. 914 (1950). Also see *United States* v. *Bivona*, 487 F.2d 443, 447 (2d Cir. 1973) ("proof of guilt was overwhelming") and *United States* v. *White*, *supra* at 207 ("proof of guilt was clear and convincing. The verdict was ensured by the defendant's words and not the prosecutor's").

In the instant case, the appellant had put his credibility at issue by testifying. His testimony was inconsistent with the overwhelming proof of guilt introduced through two official documents (passport and visa application form) and two expert witnesses. There was, in addition, strong circumstantial evidence against appellant (open round-trip ticket, incomplete identity card). Further, appellant's testimony at the trial was clearly not credible. It must have

been apparent to the jury that appellant had not been to New York City in May, 1974. Judge Weinstein had good reason to find "beyond a reasonable doubt [appellant] perjured himself" (G.A. 27-28). The prosecutor thus had ample support in his comments on the credibility of appellant, the principal defense witness.

The Government also submits that the nature of the offense charged in this case, impersonation of another person in order to gain entry into the United States, formed a background before which the credibility of appellant was the central issue. In this sense, the instant case differs from *United States* v. *White, supra,* where the charge was assault with a dangerous weapon. It was only logical, in the instant case, for the prosecutor to comment upon the statements of the accused where the very crime charged was that representations by appellant were false. In stating that appellant had "lied", the prosecutor was not attempting to characterize the appellant for general purposes but was merely trying to describe the conduct of the appellant in the context of the particular crime charged.

That the summation of the prosecutor, in this his first trial, did not create an impression of unfair prejudice is reflected in the trial Judge's comments * in ruling on a motion for a mistrial made by defense counsel at the invitation of the judge, after the jury had been charged and begun deliberations:

> I think the reason [the objection] comes late is that . . . at the time [prosecutor's summation] occurred

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* The record, in at least two places particularly, supports the trial Judge's view of the prosecutor's demeanor: A potentially prejudicial notation on the passport was covered up at the Government's initiative (11); the Government offered to excuse the case agent from the courtroom during appellant's testimony because the agent might have been a rebuttal witness (92-93).

> there was no impression of any overreaching. The statement of the United States Attorney was given in a way that I thought made it fairly clear to the jury that he was arguing hypothetically and not from his own knowledge but I caution the United States Attorney not to do that again . . . (184-185).

The Government submits, in addition, that the summation of defense counsel reflects the fact that there was no real support, in fact or in logic, for the assertions by appellant from the witness stand that the passport, visa and identification card properly belonged to appellant. The defense attorney argued to the jury that the signature samples given by appellant were not valid in that appellant may have been nervous while writing them (G.A. 4). The defense attorney made no effort to explain the fingerprint testimony, or the document alteration testimony (birth date and photo substitution) or the photograph and birth date written on the visa application form. Only vague arguments on the possibility of mistake by Dominican authorities, American Consular authorities or by appellant himself were made by the defense attorney.

POINT II

If the prosecutor committed error, such error was cured by the cautionary charge of the trial judge.

Immediately subsequent to the portion of the summation put at issue by appellant in this appeal, Judge Weinstein interrupted the prosecutor to state to the jury:

> ". . . you understand, what counsel thinks is not important, what you think is. He is just suggesting what you should think. His thought are of importance on this point" (103).

Later, at the request of the defense attorney, Judge Weinstein supplemented his charge to the jury with the admonition:

> You have heard all the evidence in this case. Any fact the Government attorney said that the defendant is lying should not be given any weight except as the evidence supports that. There is nothing that the Government attorney knows that you don't know; is that clear? Decide the case on the evidence, not on what somebody else thinks (174-175).

This circuit has held repeatedly that curative charges can overcome inappropriate remarks of prosecutors. *United States* v. *Bivona, supra,* at 447; *United States* v. *Pfingst,* 477 F.2d 177, 189 (2d Cir.), *cert. denied,* 412 U.S. 941 (1973); *United States* v. *Semensohn,* 421 F.2d 1206, 1210 (2d Cir. 1970).

In *United States* v. *Briggs,* 457 F.2d 908, 911-12 (2d Cir.), *cert. denied,* 409 U.S. 986 (1972), this Court held that error was adequately cured where the judge told the jury to disregard statements by the prosecutor that were totally speculatory. The prosecutor in *Briggs* theorized in his summation to the jury that the defense might have been providing drugs to a defense witness to "keep [the witness] going" through the trial. The Government submits that the instant case merits affirmance more strongly than did the *Briggs* case since the prosecutor's remarks in the instant case centered on the evidence and not on speculations. The Government submits that Judge Weinstein's curative charge, coming immediately after the utterance of the language in question, and as a supplement to the judge's charge immediately before the jury began to deliberate, preserved the trial as a fair proceeding.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

March 5, 1975

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AFFIDAVIT OF MAILING

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EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 6th day of March 1975 he served a copy of the within

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by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square, New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
6th day of March 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977